ARKANSAS SUPREME COURT

No. CR 06-1458

NOT DESIGNATED FOR PUBLICATION

STEVIE TURNER
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered **February 8, 2007**

PRO SE MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF AND PETITION FOR WRIT OF *CERTIORARI* TO COMPLETE THE RECORD [CIRCUIT COURT OF FAULKNER COUNTY, CR 2004-2402, HON. MICHAEL A. MAGGIO, JUDGE]

APPEAL DISMISSED; MOTION AND PETITION MOOT.

PER CURIAM

In 2004, Stevie Turner was found guilty of breaking or entering, first-degree terroristic threatening, and aggravated robbery, and sentenced by the court as a habitual offender to 120 months' imprisonment on each charge to be served concurrently.[1] The Arkansas Court of Appeals affirmed. *Turner v. State*, CACR 05-645 (Ark. App. June 28, 2006). Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition and appellant, proceeding *pro se*, lodged an appeal here from the order.

Now before us is appellant's *pro se* motion for extension of time to file appellant's brief and petition for writ of *certiorari* to complete the record on appeal. We need not consider the motion or petition as it is apparent that appellant could not prevail in this appeal if it were permitted to go forward. Accordingly, we dismiss the appeal and hold the motion and petition moot. This court has

[1]At trial, the State requested a *nolle prosequi* as to Count 3, terroristic threatening.

consistently held that an appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *See Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*).

The charges against appellant arose from an incident where Mr. Hare, the owner of a truck, returned to his truck and saw appellant jumping out of the cab. As appellant began to walk away, Mr. Hare, then joined by Mr. Brown, followed appellant while calling for police assistance. Mr. Hare asked appellant what he had taken from the truck and appellant denied being in the truck. Then appellant told the men to back off or they would get shot. He was apprehended shortly thereafter. At trial, appellant first contended that he had not been in the truck. Later, he testified that he might have been intoxicated that day and possibly misidentified the truck as one his brother owned for an explanation of why he had been in the truck.

In his original Rule 37.1 petition to the trial court, appellant complained that at trial and on appeal, his trial counsel rendered ineffective assistance for her failure to argue insufficiency of the evidence, including the requisite mental state, for each of the charges. In his amended petition[2], appellant maintained that the State improperly amended a charge against him to conform to the evidence presented, and that trial counsel failed to object to the amendment. Appellant also found

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[2]The trial court noted in its order that appellant filed his petition, an amended petition and a motion for leave to file an amended petition all on the same day. The court believed that appellant did so in order to avoid the ten-page limitation for Rule 37.1 petitions and stated that the petition should be dismissed for this procedural violation. However, the trial court's order also addressed the issues set forth in the original petition and the amended petition.

Although appellant's amended petition appears to be divided into four separate allegations of ineffective assistance of counsel, all the arguments made by appellant in both petitions are intertwined, and somewhat repetitive and confusing. For example, the fourth point of the amended petition is essentially the same issue raised in the original petition.

fault with all counts of the charging information as lacking certain elements, including the names of the victims in each of the counts, and his trial counsel for failing to object to the deficient information. He next argued that trial counsel failed to request that the court consider finding appellant guilty of a lesser-included offense.

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent the errors. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.*

On appeal, appellant maintains that trial counsel rendered ineffective assistance. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene, supra.* A finding is clearly erroneous when, although there was evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

As to any arguments regarding trial counsel's failure to seek a directed verdict based on insufficiency of the evidence, the transcript of the hearing before the trial court did not support appellant's allegation. Trial counsel moved for a directed verdict based on insufficiency of the evidence at the close of the State's case and at the close of appellant's case. Her argument included

the contention that the State had not shown the proper mental state to support the charges. On appeal, the court of appeals addressed the issue of sufficiency of the evidence and upheld the trial court's decision.

Because of the *Strickland* standard, the burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (*per curiam*). Allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Id.* Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State,* 352 Ark. 359, 105 S.W.3d 352 (2003). Here, appellant's conclusory allegations had no basis in fact.

Moreover, appellant's argument on this point was in actuality a challenge to the sufficiency of the evidence. A petitioner cannot rechallenge the weight and sufficiency of the evidence through an Ark. R. Crim. P. 37.1 proceeding by framing his question as an allegation of ineffective assistance of counsel. *Weatherford v. State*, 363 Ark. 579, ___ S.W.3d ___ (2005)(*per curiam*).

Next, appellant alleged that the State improperly amended the aggravated robbery charge against him, and that trial counsel failed to object to the amendment. It is well settled that an information may be amended during the trial as long as the nature or degree of the crime charged is not changed. *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978). In terms of raising this issue in a postconviction pleading, postconviction relief under Ark. R. Crim. P. 37.1 is a means to collaterally attack a conviction and is not a means for direct attack on the judgment. *Wainwright v. State,* 307 Ark. 569, 823 S.W.2d 449 (1992) (*per curiam*). Postconviction proceedings under Ark. R. Crim. P. 37.1 do not provide a remedy when an issue could have been raised in the trial or argued on appeal. *Davis v. State,* 345 Ark. 161, 44 S.W.3d 726 (2001).

Here, appellant appeared to claim that the charging information was based upon Ark. Code

Ann. §5-12-103(a), but was amended to:

> broaden the basis for the conviction after the evidence presented by the State was insufficient to prove beyond a reasonable doubt that Turner[,] with the purpose of committing a theft, immediately employed or threatened to immediately employ physical force upon Mr. Hare or Mr. Eason Brown while armed with a gun or while representing by word or conduct he was so armed like the charging felony information alleged.

As part of this argument, appellant alleged:

> [h]ad the prosecutor charged the offense in the conjunctive theory ways, then a conviction under either way of commission would be constitutionally permissible, but where the felony information charged only the one way of commission then there could not be a disjunctive way of commission allowed as the basis for the robbery conviction, for it violated Turner's right to fair notice of the charges as guaranteed in the 6th Amendment to the United States Constitution as incorporated in and made applicable to the states via the 14th Amendment's Due Process Clause.

Apparently, appellant's conjunctive/disjunctive theory rests on the use of "and" rather than "or," that resulted in prejudice "by the constructive amendment which allowed [appellant] to be convicted based upon the uncharged theory[.]"[3]

Appellant previously raised the "uncharged" issue on appeal in the *pro se* points submitted to the court of appeals. Although the court of appeals rejected the argument, a postconviction petition does not grant an appellant the right to raise an issue that is properly decided in a direct appeal. *Wainright*, *supra*.

In his next argument, appellant found defects in the information and argued that trial counsel was ineffective for failing to object to the defective information. The defects about which appellant complained included the lack of the victims' names in the various criminal counts.

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[3]The second amended felony information, filed December 7, 2004, prior to the December 28, 2004, bench trial, added Count IV:

> The said defendant . . . did unlawfully, feloniously, with the purpose of committing a theft threaten to immediately employ physical force upon another and was armed with a deadly weapon or did so represent by word or conduct that he was so armed[.]

This court has held that an information is sufficient if it names the defendant, the offense charged, the statute under which the charge was made, the court and county where the alleged offense was committed, and if it set forth the principal language of the statute and the asserted facts constituting the offense. *Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997) (*per curiam*). The minimal requirements for a proper information are sufficient to apprise a defendant of the offense. *England v. State*, 234 Ark. 421, 352 S.W.2d 582 (1962).

We note that in this matter, as in *Beard v. State*, 269 Ark. 16, 698 S.W.2d 72 (1980), appellant failed to seek additional details of the charge by filing a bill of particulars under Ark. Code Ann. §16-85-301 (Repl. 2005) and did not raise the issue of a defective information until after his conviction. The proper time to object to the sufficiency of an information is prior to trial. *Sawyer*, *supra*, citing *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991); *England, supra*; Ark. Code Ann. § 16-85-705 (1987).

As both of these arguments related to the felony information had no basis in law or in fact, trial counsel did not render ineffective assistance of counsel. Trial counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene, supra*; *Camargo v. State,* 346 Ark. 118, 55 S.W.3d 255 (2001). Appellant also failed to show how he was prejudiced. Moreover, as with the first issue raised, appellant's underlying issue continues to be a direct challenge to the sufficiency of the evidence, which is not permitted in a petition for postconviction relief. *Weatherford*, *supra*.

We note that appellant also claimed that double jeopardy attached as the State dismissed one count of terroristic threatening, Count III; appellant was convicted on Count II, but maintains that Count II should have been dismissed as well. The State made it abundantly clear at the trial to the

bench that Count III, terroristic threatening, concerned a second victim, Mr. Brown, who did not wish to testify at the trial. The remaining counts, Counts I, II and IV, for which appellant was convicted, related to the victim who did testify at the bench trial, Mr. Hare. Thus, double jeopardy simply is not an issue as framed by appellant because each count of terroristic threatening involved a different victim. Moreover, appellant cites no authority for his conclusions. We have frequently stated that we will not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003).

Appellant also alleged that trial counsel was ineffective because she failed to submit the lesser-included offense of second-degree terroristic threatening to the trial court for consideration. However, it would have made no sense to ask the trial court to consider this lesser-included offense when appellant contended that he did not make any threats toward Mr. Hare and Mr. Brown. *See, e.g., Franklin v. State,* 314 Ark. 329, 863 S.W.2d 268 (1993). As a matter of strategy, appellant's trial counsel might have foregone bringing the lesser-included offense to the trial court's attention, especially since the lower offense was inconsistent with his defense at trial. Matters of trial tactics and strategy are not grounds for postconviction relief, and this reason alone is sufficient to affirm on this point. *Noel*, *supra*.

Appeal dismissed; motion and petition moot.